GAHC010028712021

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : RFA/7/2021

DIPAK DEKA
S/O- LATE UMESH DEKA, R/O- MALIGAON CHARIALI, GUWAHATI- 781011, KAMRUP(M), ASSAM.

VERSUS

GANESH DEKA
S/O- LATE MADHU RAM DEKA, R/O- DURGA SAROBAR, KAMAKHYA GATE, GUWAHATI- 781009, DIST.- KAMRUP(M), ASSAM

Advocate for the Petitioner : MR. R C SANCHATI

Advocate for the Respondent : MS S DAS

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

JUDGMENT

Date : 21-07-2022

Heard Mr. R.K. Jain, learned counsel for the appellant and Mr. S.P. Roy, learned counsel for the respondent.

2. The instant appeal arises out of the judgment and decree dated 18.06.2020 passed by the Court of the Additional District Judge No.5, Kamrup (M), Guwahati in Probate Title Suit No.11/2014 thereby

granting the probate of the Will dated 14.06.2010.

3. For the purpose of convenience, the parties herein are referred to in the same status as they stood before the trial Court.

4. One Niroda Deka (since deceased), (herein after referred to as testatrix) had executed a will dated 14.06.2010 whereby, the Plaintiff was made executor of the will and the properties described in the Schedule to the said Will was bequeathed in favour of her daughter Smti. Niva Deka. The testatrix expired on 14.07.2010 at her residence at Maligaon Chariali, Guwahati 781011. Pursuant thereto, the Plaintiff being the executor of the Will dated 14.06.2010 filed an application under Section 276 of the Indian Succession Act, 1925 (for short "the Act of 1925") for a Probate with Will annexed. In the said application citation was given as regards three sons and the daughter of the testatrix. The said application was filed before the Court of the District Judge, Kamrup (M) at Guwahati and was registered and numbered as Misc (P) Case No.374/2010. The record shows that on 18.11.2011, the plaintiff filed two evidence on affidavit alongwith NOC's of the defendant No.1 & 2. Relevant to mention that the counsel appearing for the Defendants had filed a Petition No.40/2011 praying adjournment for filing objection and accordingly 14.02.2011 was fixed for filing objection. It reveals from the record that on 02.07.2011 the Defendant Nos.1 and 2 filed their written objection.

5. In the said written objection various preliminary objections were taken as regards the non maintainability of the said Probate proceedings. On merits, it was stated that late Niroda Deka (testatrix) had not left any Will or testament in favour of the malafide

beneficiaries and or in favour of the Plaintiff as her executor in any manner and hence the question of grant of Probate certificate by the Court in favour of the Plaintiff did not arise at all. It was further stated that the alleged Will is not a registered instrument/document as per the requirement of the Registration Act as it relates to immovable property, value of the said is more than Rs.100/- and hence the same is liable to be dismissed/rejected with cost. In paragraph No.11 which is the reply to the statements made in paragraph Nos.2, 3, 4, 5, 6, 7 and 8 of the Probate Application the Defendants stated that alleged Will is not executed and left behind by the deceased Niroda Deka and the same is a forged, manufactured and got up document of the illegal beneficiary and the petitioner made out taking the advantage of the helpless conditions of the answering Defendants. Relevant herein to mention that except the denial of execution of the Will, there was no mention whatsoever, as to why the Will has been stated to be forged, manufactured and got up document.

6. It is pertinent to mention that a perusal of the written objection would not disclose in any manner that there was any suspicious circumstances leading to the execution of the said Will by the Testatrix. The record further shows that pursuant to the filing of the said written objection the said Probate Misc (P) Case No.374/2010 was re-registered as Title Suit No.6/2011. On 26.06.2012, the Court below framed as many as 4 (four) issues which are as follows:

(I) Whether the petition for Probate of the petitioner is maintainable in the present form or not?

(II) Whether Niroda Deka (since deceased) executed her last

Will on 14.06.2010 in due conformity with law?

(III) Whether the Plaintiff/Petitioner is entitled to the relief as prayed for?

(IV) To what any other relief/relief(s) the parties are entitled to?

7. The record further reveals that on 26.09.2013 the plaintiff filed evidence on affidavit of 4 plaintiff witnesses and exhibited various documents. Thereafter it appears from the perusal of the order dated 25.08.2014 that the said Probate Title Suit No.6/2011 was re-registered as Probate Title Suit No.11/2014. It further appears that the defendant adduced the evidence of two witnesses, who were the defendant No.1 Shri Dipak Deka and one Smti. Dayamonti Das, who was the defendant witness No.2. The witnesses upon being cross-examined, the trial Court vide a judgment dated 18.06.2020 decreed the Probate Title Suit in favour of the plaintiff. In doing so, the trial Court held that the Petition for Probate filed by the petitioner was maintainable. While deciding the issue No.2, the Trial Court after taking into account the various evidence led as well as the propositions of law relating to grant of Probate came to a finding that the plaintiff had succeeded in establishing by cogent evidence that the Testatrix had affixed her thumb impression on the Will as per her own volition on 14.06.2010 at Guwahati having understood the nature and affect of the disposition. It was further held that the defence failed to rebut the evidence of the plaintiff side and in absence of any cogent materials on record to indicate existence of suspicious circumstances surrounding the execution of the Will, the genuineness of the Will also

cannot be doubted.

8. On the basis of the said findings, the trial Court held that Shri Ganesh Deka, the plaintiff was entitled for the Probate of the Will dated 14.06.2010 executed by the Testatrix. On the basis of the Issue No.2 being decided, the Issue No.3 and 4 which pertains to as to whether the Plaintiff is entitled to the relief as prayed for and to what other relief/relief(s) the parties are entitled to, the trial Court passed appropriate orders in that regard.

9. Being aggrieved, the present appeal has been filed by the Defendant No.1 as the Appellant before this Court raising various grounds of objections.

10. Mr. R.K. Jain, the learned counsel for the appellant submits that the trial Court did not take into consideration that the Notary before whom the purported Will was executed, was not examined. He further submitted that the trial Court did not take into consideration in the proper perspective that in the purported Will there is no mention that the Testatrix had requested the witnesses to put their signatures. The learned counsel further submitted that the death of the Testatrix on 14.07.2010 just one month after the execution of the Will and that she was suffering from various ailments during the period gave rise to suspicious circumstances regarding her mental and physical health which was not properly taken into consideration by the learned trial Court.

11. It was further submitted the manner in which the proceedings were conducted also would show that the plaintiff was trying to get

the Will probated by hook or by crook. Referring to the Evidence on Affidavit cum NOC filed on behalf of the Defendant Nos.1 and 2 on 18.01.2011 (exhibited as Exhibit 4 and 5) when the date was not fixed for filing of the evidence clearly show the intent of the plaintiff. He further submitted that there were four Issues framed of which the trial Court had only given findings as regards two Issues, which was contrary to Order XIV Rule 2 of the Code of Civil Procedure, 1908 (for short "the Code") which mandates that the trial Court has to decide on all issues. He further submitted the non examination of the Notary Public before whom the purported Will was executed is fatal taking into account that the Testatrix had put her thumb impression before the Notary public. Further to that the Advocate who identified the Testatrix was also not examined.

12. On the other hand, Mr. S.P. Roy, the learned counsel appearing on behalf of the respondent submits that a perusal of the written objection as well as the evidence of the defendants would neither suggest or show in any manner that there are any pleadings to the effect that the Testatrix was not capable of executing the Will on the ground that she was mentally and physically not capable of. He further submitted that the evidence on affidavit cum NOC's were duly given by the Defendant Nos.1 and 2, which were exhibited as Exhibit-4 and Exhibit-5, wherein they had duly admitted the fact of their knowledge that their mother had executed a Will in favour of their sister in connection with the property which fell in the share of their deceased mother after partition. It was mentioned in the evidence on affidavit cum NOC that they had no objection if the Court grants

Probate or letter of administration in favour of their sister of the Estate mentioned in the last Will and Testament of the Testatrix. Referring to the cross-examination of the Defendant No.1, Shri Dipak Das, he submits that during his cross-examination he had duly admitted the execution of the Evidence on Affidavit cum NOC of himself as well as of Defendant No.2. The signatures appearing in said two affidavit cum NOC marked as Exhibit-4 and Exhibit-5 were also admitted to be signatures of the Defendant Nos.1 and 2 by the defendant witness No.1. Under such circumstances the learned counsel submits that the objection so raised to the Will of the Testatrix being Probated is absolutely malafide and filed only to deprive the sister of her legitimate share.

13. In order to dispel, the suspicious circumstances so raised for the first time before the Appellate Court, the learned counsel submits that a perusal of the Will in question would show that the properties therein had been bequeathed in favour of the daughter of the Testatrix and not to any other person. Referring to Exhibit-3 which is the deed of family settlement, the learned counsel submits that a perusal thereof, which have been duly admitted by the defendants as a genuine document during the cross-examination, would show that in the said deed of family partition, no property have been given to the daughter of the Testatrix who also had an equal share in respect to the properties left behind by her father and it is under such circumstances that the mother i.e., the Testatrix had bequeathed her portion of the properties in favour of the daughter. On the question as regards the non- examination of the Notary Public or the advocate

who had identified, he submits that the Will can be executed by the Testator or the Testatrix on a piece of paper. It is neither required to be registered nor even executed before the Notary Public. What is required is only conformity with the provisions of Section 63 of the Act of 1925 and filing of the application in terms with Chapter 4 of Part-IX of the Act of 1925.

14. As regards the statement made by the learned counsel for the appellant that the impugned judgment is not in conformity with the Order XIV Rule 2 of the Code, the learned counsel for the respondent submitted that a perusal of the judgment passed by the trial Court would show that all the issues have been duly addressed and as such, the question of non compliance of the Order XIV Rule 2 of the Code does not arise. He further submitted that it is only the Defendant No.1 who for vested interest had objection to Probating the last Will of his mother and this would be apparent from the fact that the Defendant No.2 had not come before the Court to give evidence nor filed any appeal against the Judgment impugned in the instant proceedings. There is also no mention in their pleadings as well as in the evidence of the Defendant No.1 about the health issues of the Testatrix nor any material evidence have been placed on record to show that the Testatrix was suffering from ailment which incapacitated the Testatrix to execute the Will in question. Under such circumstances, the learned counsel therefore submitted that the filing of the instant appeal is nothing but to delay and deprive the sister of her legitimate rights in respect to the properties bequeathed to her by her mother for which the Appeal is liable to be dismissed.

15. From the above submissions made by the learned counsel for the parties, the following point for determination arises for consideration, "*Whether the Will in question was executed by the Testatrix (lt. Niroda Deka) in sound mind and the plaintiff was able to prove the same in accordance with law*?"

16. For determination of the above point for determination, it is required to analyse the legal principles applicable to the making of a testamentary document like Will, its proof and its acceptance by the Court. The Will being a rather solemn document that comes into operation after the death of the Testator/Testatrix, special provisions are made in the statute for making of a Will and for its proof in the Court of law. Section 59 of the Act of 1925 provides that every person of sound mind, not being a minor, may dispose of his/her property by Will. A Will or any portion of the Will, the making of which has been caused by fraud or coercion or by any such importunity that has taken away the free agency of the Testator/Testatrix, is declared to be void under Section 61 of the Act of 1925. Section 62 stipulates that the Will is liable to be revoked or altered by the maker of it at any time when he/she is competent to dispose of his/her property by Will. Chapter – 3 of Part – IV of the Act of 1925 contains the provisions for execution of unprivileged Will. The said chapter has two provisions i.e., Section 63 and Section 64. Section 63 being relevant for the purpose of the instant dispute the same is quoted herein below:

Section 63 of the Indian Succession Act, 1925

63 Execution of unprivileged Wills. —Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:—

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

17. A perusal of the above quoted section would show that it is the requirement of law that the Will ought to be attested by two or more witnesses. Hence any document propounded as a Will cannot be used as evidence, unless, at least, one attesting witness has been examined for the purpose of proving its execution, if such witness is available and is capable of giving evidence as per the requirement of Section 68 of the Evidence Act that reads as under:

Section 68 of the Indian Evidence Act, 1872

68. Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence [provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]

18. The above quoted Section 68 deals with the proof of the execution of the document required by law to be attested and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. The said provision prescribed the requirement and the nature of proof which must be satisfied by the party who relies on a document before a Court of law. Therefore, Section 59 and Section 63 of the Act of 1925 are of spinal significance inasmuch as Section 59 provides that every person of sound mind, not being a minor, may dispose of his/her property by Will and the three illustrations in the said Section indicate what is meant by the expression "a person of sound mind" in the context. On the other hand, Section 63 requires that the Testator/Testatrix shall sign or affix his/her mark to the Will or it shall be signed by some other person in his/her presence and by his/her direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the

writing as a Will. This Section also requires that the Will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the Will set by the propounder is proved to be the last Will of the Testator/Testatrix, has to be decided in the light of these provisions.

19. The questions therefore which have to be in the mind of the Testamentary Court are has the Testator signed the Will? Did he understand the nature and affect of the disposition in the Will? Did he put his signature in the Will knowing what is contained? Stated broadly it is the decision of these questions which determines the nature of findings on the question of proof of the Will. At this stage, it may not be out of place to mention that Chapter VI of the Act of 1925, in Section 74 to 111, for construction of the Wills which, in their sum and substance, make the intention of the Legislature clear that any irrelevant mis-description or error is not to operate against the Will and approach has to be to give effect to a Will once it is found to have been executed in the sound state of mind by the Testator/Testatrix while exercising his/her free Will.

20. What culls out therefrom is that the Will has to be proved like any other document except as to the special requirement of the attestation prescribed by Section 63 of the Act of 1925. As in the case of proof of other documents so in the case of proof of Wills, it would be idle to expect proof with mathematical accuracy. No doubt Section 67 of the Indian Evidence Act, 1872 has also to be taken note of which stipulates that if a document is alleged to be signed by any person, the signature on the said document must be proved to be in

his handwriting and for proving such a handwriting under Section 45 and 47 of the Act, the opinion of the experts and of persons acquainted with the handwriting of the person concerned are made relevant. Therefore, the test to be applied would be the usual test of satisfaction of the prudent mind in such matters.

21. There is a important distinguishing feature between Wills from other documents. Unlike other documents, the Wills speaks from the death of the Testator and so when it is propounded or produced before the Court, the Testator/Testatrix had already departed the world for which he/she cannot say whether it is his/her Will or not and this aspect naturally introduced an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and Testament of the departed Testator/Testatrix. Even so, in dealing with the proof of Will, the Court will start on the same enquiry as in the case of proof of documents. The propounder would be called upon to show by satisfactory evidence that the Will was signed by the Testator/Testatrix, that the Testator/Testatrix at the relevant time was in sound and disposing state of mind, that he/she understood the nature and the affect of the dispositions and put his/her signature/thumb impression to the document of his/her own free will. Ordinarily when the evidence adduced in support of the Will is disinterested, satisfactory and sufficient to prove the sound and disposing state of mind of the Testator/Testatrix and his/her signature as required by law, Court would be justified in making a finding in favour of the propounder, in other words the onus on the propounder can be taken to be

discharged on proof of the essential facts just indicated.

22. There may, however, be cases in which the execution of the Will may be surrounded by suspicious circumstances. The alleged signature of the Testator/Testatrix may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the Testator/Testatrix may not remove the doubt created by the appearance of the signature. The condition of the mind of the Testator/Testatrix may appear to be very feeble and debilitated; and the evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the Testator/Testatrix; the dispositions made to the Will may appear to be unnatural, improbable or unfair in the light of the relevant circumstances; or the Will may otherwise indicate that the said disposition may not be the result of the free will and mind of the Testator/Testatrix. In such cases, the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last Will of the Testator/Testatrix. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged Court would be reluctant to treat the document as the last Will of the Testator. It is true that if a caveat is filed alleging exercise of undue influence, fraud or coercion in respect to the execution of the Will propounded, such plea may have to be proved by the caveator but even without such plea and circumstances may raise a doubt as to whether the Testator/Testatrix was acting of his/her own free will in executing the will and in such circumstances, it would be a part of the

initial onus to remove any such legitimate doubts in the matter.

23. Apart from the suspicious circumstances to which this Court had referred, in some cases the Wills propounded disclose another infirmity. The propounders themselves take a prominent part in the execution of the Will which confer on them substantial benefits. If it is shown that the propounder had taken prominent part in the execution of the Will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstances attending the execution of the Will and the propounder is required to remove the said suspicion by clear and satisfactory evidence.

24. It is obvious that for deciding the material question of facts which arises in application for Probate or in actions on Wills, no hard and fast or any inflexible rules can be laid down for the appreciation of evidence. It may, however, be stated generally stated that a propounder of a Will has to prove the due and valid execution of the Will and if there are any suspicious circumstances surrounding the execution of the Will, the propounder must remove the said suspicions from the mind of the Court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties.

25. In a recent judgment of the Supreme Court rendered in the case of ***Shivakumar vs. Sharanabasappa, (2021) 11 SCC 277***, the Supreme Court laid down the relevant principles governing the adjudicating process concerning the proof of Wills in paragraph No.12

which is quoted herein below:

> *12. For what has been noticed hereinabove, the relevant principles governing the adjudicatory process concerning proof of a will could be broadly summarised as follows:*
>
> *12.1. Ordinarily, a will has to be proved like any other document; the test to be applied being the usual test of the satisfaction of the prudent mind. Alike the principles governing the proof of other documents, in the case of will too, the proof with mathematical accuracy is not to be insisted upon.*
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> *12.2. Since as per Section 63 of the Succession Act, a will is required to be attested, it cannot be used as evidence until at least one attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive and capable of giving evidence.*
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> *12.3. The unique feature of a will is that it speaks from the death of the testator and, therefore, the maker thereof is not available for deposing about the circumstances in which the same was executed. This introduces an element of solemnity in the decision of the question as to whether the document propounded is the last will of the testator. The initial onus, naturally, lies on the propounder but the same can be taken to have been primarily discharged on proof of the essential facts which go into the making of a will.*
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> *12.4. The case in which the execution of the will is surrounded by suspicious circumstances stands on a different footing. The presence of suspicious circumstances makes the onus heavier on the propounder and, therefore, in cases where the circumstances attendant upon the execution of the document give rise to suspicion, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.*

12.5. If a person challenging the will alleges fabrication or alleges fraud, undue influence, coercion et cetera in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may give rise to the doubt or as to whether the will had indeed been executed by the testator and/or as to whether the testator was acting of his own free will. In such eventuality, it is again a part of the initial onus of the propounder to remove all reasonable doubts in the matter.

12.6. A circumstance is "suspicious" when it is not normal or is "not normally expected in a normal situation or is not expected of a normal person". As put by this Court, the suspicious features must be "real, germane and valid" and not merely the "fantasy of the doubting mind".

12.7. As to whether any particular feature or a set of features qualify as "suspicious" would depend on the facts and circumstances of each case. A shaky or doubtful signature; a feeble or uncertain mind of the testator; an unfair disposition of property; an unjust exclusion of the legal heirs and particularly the dependants; an active or leading part in making of the will by the beneficiary there under et cetera are some of the circumstances which may give rise to suspicion. The circumstances above noted are only illustrative and by no means exhaustive because there could be any circumstance or set of circumstances which may give rise to legitimate suspicion about the execution of the will. On the other hand, any of the circumstances qualifying as being suspicious could be legitimately explained by the propounder. However, such suspicion or suspicions cannot be removed by mere proof of sound and disposing state of mind of the testator and his signature coupled with the proof of attestation.

12.8. The test of satisfaction of the judicial conscience comes into operation when a document propounded as the will of the testator is surrounded by suspicious circumstance(s). While applying such

test, the court would address itself to the solemn questions as to whether the testator had signed the will while being aware of its contents and after understanding the nature and effect of the dispositions in the will?

12.9. In the ultimate analysis, where the execution of a will is shrouded in suspicion, it is a matter essentially of the judicial conscience of the court and the party which sets up the will has to offer cogent and convincing explanation of the suspicious circumstances surrounding the will.

Suspicious circumstances/features concerning the will in question

26. In the backdrop of the above, let this Court therefore take into consideration the facts of the instant case. The Will in question has been exhibited as Exhibit-2. A perusal thereof shows that the Testatrix had put her thumb impression on the Will. The said document was signed in presence of three witnesses, namely, Rajendra Kr. Sarma (PW-4), Shri Bipul Das and Shri Anup Kumar Talukdar (PW-3). The Testatrix was identified by one advocate, namely, Ajit Kumar Sarma. Therefore, the Will in question is in conformity with Section 63 of the Act of 1925.

27. Now the question arises as to whether the Will in question was executed by the Testatrix in her sound mind. In the evidence of the propounder of the Will i.e., PW-1, it was mentioned that the writer of the Will Shri Mathur Chandra Bayan (PW-2) had read over and explained the contents of the Will to his mother in law as she was illiterate. Thereafter, upon understanding the contents of it, she had executed her said last Will and testament before the Notary on 14.06.2010 in presence of the attesting witnesses, Shri Rajendra Kr.

Sarma, Shri Bipul Das and Shri Anup Kumar Talukdar and Others. Nothing could be brought on record during the cross-examination that the Testatrix was not capable of making the Will or was incapacitated, mentally or on account of physical ailment to execute the Will. In the written objection the stand taken by the defendant Nos.1 and 2 was specific. It was mentioned that the Will in question is a forged, manufactured and got up document by the illegal beneficiaries and the petitioner/plaintiff in order to take advantage of the helpless condition of the answering Defendants. To the said affect, evidence have been led.

28. Both in the written objection as well as the evidence on affidavit of the defence witness there is no mention whatsoever, that the Testatrix was not capable of executing the Will for reasons that she was not of sound mind. The only allegation is that the Will is a forged, manufactured and got up document. At this stage, if this Court take into consideration the provisions of Order VI Rule 4 of the Code, it would be seen that in all cases in which a party's pleadings relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms, particulars, with dates and items if necessary shall be stated in the pleadings. Order VI Rule 2 of the Code stipulates that every pleadings shall contain a statement of material fact on which a party relies either for his claim or defence. Such a pleading should contain the necessary foundation for raising an appropriate issue. Under Order VIII Rule 2 of the Code, a defendant shall make specific pleadings while under

Rule 3 denial should be specific. Therefore, it is the requirement of law that when fraud is pleaded there has to be specific pleadings with material particulars in either the clause or the Defence. However, there is no specific statement made or particulars given as to why the defendants states that the Will in question is a forged, manufactured and got up document. As already observed in the judgment of the Supreme Court in *Shivakumar (supra),* it was observed that if a person challenging the Will alleges fabrication or alleged fraud, undue influence, coercion etc in regard to the execution of the Will such pleas have to be proved by him. At this stage, it may also be relevant herein to take note of Exhibit-4 & Exhibit-5 which were the NOC cum Evidence on Affidavit sworn by the Defendant Nos.1 and 2 respectively. The execution and the signatures in respect to Exhibit 4 and 5 were duly admitted during the time of cross-examination. In Exhihibit-4 and 5, the Defendant Nos.1 and 2 have categorically admitted that the mother had executed the Will in question and bequeathed her share of the property in favour of her daughter. Another very relevant fact which needs to be taken into consideration is that the written objection was filed much later to the Evidence on Affidavit cum NOC but there is no mention in the written objection relating to the said evidence on affidavit cum NOC to be forged or executed due to coercion. This Court cannot overlook the fact that the Defendant No.2 had not entered the witness box to deny the execution of the Exhibit-5 as well as have not filed any appeal against the Judgment impugned in the instant Appeal. Under such circumstances the allegation of fraud or that the Will was

manufactured illegally cannot be said to be proved.

29. Be that as it may, it is also relevant to take note of that vide the Will in question the entire properties left behind by the Testratrix was bequeathed in favour of the daughter. The question which needs to be also looked into as to whether the same could come within the ambit of suspicious circumstances. In a very recent judgment of the Supreme Court in the case of ***V. Prabhakara Vs. Basavaraj (Dead) by Legal Representatives and Anr***, reported in ***(2022) 1 SCC 115***, the Supreme court observed that testamentary Court is not a court of suspicion but that of conscience. It has to consider the relevant materials instead of adopting an ethical reasoning. It was further observed that a mere exclusion of either a brother or sister *per-se* would not create a suspicion unless it is surrounded by other circumstances creating any inference. Paragraph 25 of the said judgment is quoted herein below:

> 25. *A testamentary court is not a court of suspicion but that of conscience. It has to consider the relevant materials instead of adopting an ethical reasoning. A mere exclusion of either brother or sister per se would not create a suspicion unless it is surrounded by other circumstances creating an inference. In a case where a testatrix is accompanied by the sister of the beneficiary of the will and the said document is attested by the brother, there is no room for any suspicion when both of them have not raised any issue.*

30. Now coming back to the facts of the instant case, it would be seen that vide Exhibit-3 which is a deed of family settlement dated 26.08.2009, the properties of late Umesh Deka was amicably

partitioned amongst his legal heirs except his daughter, Smti Niva Deka, who was not a part of the said deed of family settlement. Every legal heirs of late Umesh Deka barring his daughter got a share in respect to the property. As per clause 4 of the said exhibit-3, the schedule D property fell in the share of late Niroda Deka i.e., the Testatrix. The said property mentioned in Schedule D of exhibit-3 was bequeathed by the testatrix in favour of her daughter. This cannot be said to be a suspicious circumstances in the opinion of this Court.

31. The execution of the evidence on affidavit cum NOC i.e., Exhixbit-4 and 5 which have been duly admitted and the Defendant No.2 not coming before the Court to adduce evidence and also non-filing of appeal are pointers to the fact that there are no suspicious circumstances resulting in the execution of the Will. It is only the Defendant No.1 who is the appellant herein, wants to deprive his sister of her rights to the property which stands bequeathed on the basis of the Will in question.

32. Now coming to the judgment of the trial Court, it would be seen that that trial Court had duly taken into consideration while deciding the Issue No. II all the aspects including the fact that the Will has been proved, there is no contradiction in the evidence of the plaintiff witnesses and the circumstances under which the Will was executed was also not suspicious. This Court duly agrees to the findings of the Court below as regards the Issue No.2 and the same is in accordance with the well settled principles of law. It is also relevant to take note of that the trial Court while passing the judgment have also taken into consideration the Issue Nos.III and IV as would be

seen from a perusal of the Order whereby, the petition for Probate was allowed on contest without cost and appropriate directions were issued in that regard. Therefore, this Court is of the opinion that the judgment and decree passed by the trial Court in Probate Title Suit No.11/2014 does not suffer from any infirmity in law for which the said judgment and decree is affirmed by this Court. Accordingly, the instant appeal stands dismissed with cost.

33. Prepare the decree accordingly.

34. Send down the LCR.

JUDGE

Comparing Assistant